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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JANE ROE 1-2, on behalf of themselves and all others similarly situated,

Plaintiff,

v.

SFBSC MANAGEMENT, LLC; and DOES 1-200,

Defendants.

Case No. 3:14-cv-03616-LB

DEFENDANT'S NOTICE OF MOTION & MOTION FOR STAY OF ACTION PENDING APPEAL; MEMORANDUM OF POINTS & AUTHORITIES

Date: April 16, 2015
Time: 9:30 a.m.
Place: Courtroom C, 15th Floor
Judge: Hon. Laurel Beeler

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PLEASE TAKE NOTICE that on Thursday, April 16, 2015 at 9:30 a.m., or on an earlier date set by Order of the Court, before the Honorable Magistrate Judge Laurel Beeler in Courtroom C of the above captioned court, located at 450 Golden Gate Avenue, 15th Floor, San Francisco, CA 94102, Defendant SFBSC Management, LLC ("BSC") will, and hereby does, move for an order to stay this action pending resolution of Defendant's appeal of the Court's order denying Defendant's motion to compel arbitration.

POINTS & AUTHORITIES

I. INTRODUCTION

On March 2, 2015, this Court entered its Order Denying Arbitration (ECF No. 53), denying BSC's motion to compel plaintiffs Jane Roe #1 and Jane Roe #2 to arbitrate their claims. The Court ruled that several parts of the BSC's arbitration agreement are unconscionable and declined to sever those provisions from the remainder of BSC's contract with Plaintiffs. The Court acknowledged that, to carry their burden of showing unconscionability, Plaintiffs needed to show that the arbitration provision had both procedurally and substantively unconscionable components. (*Id.* at 8-9) Because of the "closeness" of the procedural unconscionability issue (*id.* at 12)—*i.e.*, that "there is at least mild procedural unconscionability" (*id.* at 13)—Plaintiffs were required to make a correspondingly stronger showing on substantive unconscionability. The Court found they did so. (*Id.* at 14-16)

BSC has noticed an appeal to the Ninth Circuit from the Order. (ECF No. 58) BSC now moves for an order staying this action pending that appeal, and until the Ninth Circuit's mandate issues. A stay is warranted because the Order presents a substantial question—indeed, an issue of first impression—for appellate review, denial of a stay would cause BSC substantial harm while Plaintiffs would suffer little or no prejudice, and the public interest favors a stay.

Whether or not Plaintiffs carried their burden of making a strong showing of substantive unconscionability presents a serious and substantial question for Ninth Circuit review. In particular, and as explained below, recent United States and California Supreme Court decisions call into question the district court's ruling in *Jackson v. S.A.W. Entertainment, Ltd.*, 629 F. Supp.2d 1018 (N.D. Cal. 2008), on which this Court relied in its Order. (ECF No. 53 at 7, 11-12, 15, 17.) Given these developments, and the California Supreme Court's upcoming review in *Sanchez v. Valencia Holding Co.*, No. S199119 (rev. grtd. Mar. 21, 2012), which is expected to decide between the multiple "formulations [used by California courts] in describing the test for substantive unconscionability" (RJN, Ex. A), this case is one of first impression for the Ninth Circuit. Consequently, it presents a substantial issue for appeal. *See, e.g., In re Wirecomm Wireless, Inc.*, No. 2:07-cv-02451-MCE, 2008 WL 3056491, at *3 (E.D. Cal. Aug. 1, 2008).

It would be difficult to overstate the extent to which the denial of a stay would substantially prejudice BSC. As the Court knows, the Plaintiffs seek to represent a class of thousands of exotic dancers who performed at eleven nightclubs over a period now exceeding four-and-a-half years even though the Plaintiffs themselves only performed at three of the nightclubs. Absent a stay, BSC would be forced it to engage in potentially unnecessary—but wildly expensive—litigation involving thousands of entertainers and eight additional nightclubs where the Plaintiffs never performed. All the parties' attendant time and money, and all the District Court's resources, will have been squandered if the Ninth Circuit orders Plaintiffs' claims to individual arbitration. In contrast, a stay would cause plaintiffs little or no prejudice. Finally, the public interest in the resolution of the important questions raised by BSCs appeal, and in preserving scarce judicial resources, favors granting a stay.

II. ARGUMENT

A. Standard For A Stay Pending Appeal Of A Motion To Compel Arbitration

The Ninth Circuit has adopted a four-prong test for considering a stay pending appeal of an order denying a motion to compel arbitration based on the four-prong test applicable to any motion for a stay under Rule 62 of the Federal Rules of Civil Procedure. *Britton v. Co-Op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990) (citing *C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Securities Corp.*, 716 F. Supp. 307, 309 (W.D. Tenn. 1989)); see also *Briton*, 916 F.2d at 1412 (the "system created by the Federal Arbitration Act allows the district court to evaluate the merits of the movant's claim, and if, for instance, the court finds that the motion presents a substantial question, to stay the proceedings pending an appeal from its refusal to compel arbitration"). The test is:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) [whether] public interest [favors a stay].

C.B.S. Employees, 716 F. Supp. at 309 (*quoting Hilton v. Braunskil*, 481 U.S. 770, 776 (1986)) (modifications in *C.B.S. Employees*) (cited with approval in *Britton*, 916 F.2d at 1412); *see also Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826, 829 (D.C. Cir. 1987) (granting stay pending appeal because the motion raised issues of first impression and substantial prejudice would result in the absence of a stay).

Importantly, "courts within the Ninth Circuit have taken a more relaxed approach to stay requests in connection with decisions to refrain from sending parties to arbitration and/or have determined that stay requests in such circumstances meet the traditional requirements for such a stay because of the nature of the dispute and underlying rights at issue (*i.e.,* that the right to arbitrate would be devalued, if not rendered meaningless, if litigation proceeded apace)." *Cherny v. AT&T Inc.*, No. CV 09-3625-GW (AGRx), 2010 WL 2572929, at *1 (C.D. Cal. Feb. 8, 2010). It is understandable that, having denied a motion to compel arbitration, a district court would never conclude that the party seeking a stay pending appeal is "likely to succeed on appeal" because, to "make such a finding, the district court would be saying that it erred in not granting defendant's original motion to stay the proceedings pending arbitration, and that the court of appeals is likely to reverse its decision." *C.B.S. Employees*, 716 F. Supp. at 309.

Therefore, the moving party satisfies the first prong by presenting "a 'serious legal question,' regardless of whether he has shown a mathematical probability of success." *Id.* at 310 (quoting *Washington Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977); *see also Himebaugh v. Smith,* 476 F. Supp. 502, 510 (C.D. Cal. 1978) ("district courts properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained" (internal quotation marks omitted)). Thus, for a legal question to be "serious," it must be a "question [] going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *Walmer v. United States DOD,* 52 F.3d 851, 854 (10th Cir. 1995).

In evaluating these factors, the Ninth Circuit applies a "sliding scale" to evaluation of the first three stay factors, which is defined by its two extremes. *Golden Gate Rest. Ass'n v. City of San Francisco,* 512 F.3d 1112, 1116 (9th Cir. 2008).

B. The Four Factors Favor The Court's Issuing A Stay

1. BSC's Appeal Presents Substantial Issues

As a threshold matter, this Court very nearly acknowledged the existence of a substantial issue on appeal by pointing to the "closeness of [the procedural unconscionability] issue." (ECF No. 53, at 12:25-26.) Because of the closeness of that issue, Plaintiffs were required to make a strong showing of substantive unconscionability. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000) ("the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa."). Given the closeness of the substantive unconscionability issue, however, and the fact that recent case law calls into question whether the Ninth Circuit would endorse *Jackson v. S.A.W. Entertainment, Ltd.*, 629 F. Supp.2d 1018 (N.D. Cal. 2008), on which this Court relied heavily (ECF No. 53 at 7, 11-12, 15, 17), there are substantial issues that warrant a stay pending appeal.

a. There Are Substantial Appellate Issues Concerning The Arbitration Agreements' So-Called "One-Way Ban On Collective Actions"

As noted, the *Jackson* decision, on which this Court relied, is of questionable precedential value given the U.S. Supreme Court's later decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), which held that the Federal Arbitration Act preempted California's rule, articulated in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005), prohibiting class action waivers in arbitration agreements. As *Concepcion* explained, "[t]he switch from bilateral to class arbitration sacrifices arbitration's informality and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 131 S.Ct. at 1751. Following *Concepcion*, the Supreme Court in *American Express Co. v. Italian Colors*, observed that "[w]e specifically rejected the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'" 133 S.Ct. 2304, 2312 (2013) (quoting *Concepcion*,131 S.Ct. at 1753).

In 2014, the California Supreme Court recognized in *Iskanian v. CLS Transp. Los Angeles*, that "[u]nder the logic of *Concepcion,* the FAA preempts *Gentry's* rule against employment class waivers." 59 Cal. 4th 348, 364 (2014). Respectfully, given *Concepcion, Italian Colors* and *Iskanian*, BSC contents the Ninth Circuit will conclude this Court erred in ruling that the collective action waiver was invalid. At the very least, there is a serious and substantial issue to whether the Court's ruling, again based heavily on *Jackson*, was correct.

Furthermore, the Ninth Circuit's analysis of the application of the FAA to the question of whether the class waiver is unconscionable will likely turn on the California Supreme Court's decision in *Sanchez v. Valencia Holding Co.*, No. S199119. In *Sanchez*, the Supreme Court ordered supplemental briefing on the following question:

> In formulating the standard for determining whether a contract or contract term is substantively unconscionable, this court has used a variety of terms, including "unreasonably favorable" to one party (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145); "so one-sided as to shock the conscience" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (2012) 55 Cal.4th 223, 246); "unfairly one-sided" (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071-1072; "overly harsh" (*Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 114; and "unduly oppressive" (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925). Should the court use only one of these formulations in describing the test for substantive unconscionability and, if so, which one? Are there any terms the court should not use? Is there a formulation not included among those above that the court should use? What differences, if any, exist among these formulations either facially or as applied?

RJN Ex. 1. (The parties filed supplemental briefs addressing these questions but the Court has not yet set oral argument. *Id.*)

In addition, even if the Ninth Circuit concludes that this Court applied the proper law, BSC respectfully asserts that it is likely to question the Court's reading of the class action waiver here. The Court has emphasized that "Rule 23 contemplates both plaintiff and *defendant* classes." (ECF No. 53, at 15:1 (emphasis in original; citing Fed R. Civ. P. 23(a).) The Court observed that the "bilateral possibility is that BSC—alone or with other employers—could sue a *defendant* class of performers to establish some right or liability." *Id.* at 15:20-21 (emphasis in original). The Court is correct and the class action waiver does not prevent such class defendant practice. It prohibits only claims by the performer "as a class or representative action" and the "consolidat[ion of] any claim she may have against Owner with the claims of others."

Importantly, however, the class action waiver also does not limit the performers' ability to sue a defendant class, just as it does not limit BSC's ability to sue a defendant class of performers. To the extent that the class action waiver preserves class defendant practice, it benefits Plaintiffs equally, who have the same opportunity to sue a defendant class. In addition to the issues raised by the *Concepcion-Italian Colors-Iskanian* line of cases, whether such a partial class action waiver is unconscionable appears to be a question of first impression.

Further, while the class action waiver applies only to the performers' claims, a class action waiver regarding BSC's claims would be a nullity because, as a practical matter, there is no situation in which BSC would bring a claim as a plaintiff class (as BSC argued in its pleadings in support of its motion to compel arbitration).

This case is similar to *Steiner v. Apple Computer, Inc.*, No. C 07-04486 SBA, 2008 WL 1925197 (N.D. Cal. April 29, 2008). In *Steiner*, the court ruled that, although the party seeking the stay did not show a likelihood of success on the merits, it showed that its appeal presented a "substantial issue" in that the appeal involved an issue of FAA preemption that was important to consumers and businesses. *Steiner*, 2008 WL 1925197, at *3. The substantial question was similar to the one here—*i.e.*, whether "its class arbitration waiver was unconscionable or not, under California common law." *Id.*

Similarly, in *Ward v. Estate of Goossen*, No. 14-CV-03510-TEH, 2014 WL 7273911, *3 (N.D. Cal. Dec. 22, 2014), the court concluded that the arbitration agreement

> present[ed] substantial questions that bear on the proper application of the federal and state policies favoring arbitration. Other parties entering into contracts containing statutorily required addenda, parties seeking to form contractual agreements through the incorporation of multiple documents, and parties hoping to dispose of potential ambiguities through the inclusion of a 'supremacy clause,' will likely benefit from any clarity that might be provided

by the Ninth Circuit upon appeal.

So, too, here. As Plaintiff's *Hoffmann-LaRoche* motion (ECF No. 54) emphasizes, there may be many performers who subscribed to similar arbitration agreements. The legitimate question about the enforceability of these provisions presents a substantial issue for the Ninth Circuit's resolution.

b. There Are Substantial Appellate Issues Concerning The Enforceability Of The Arbitration Cost Sharing Provision

The arbitration agreement's cost sharing provision provides for cost sharing, but also provides an exception if the arbitrator concludes that the law requires a different allocation. (ECF No. 25-5, at 4) This "different allocation" aspect of the provision distinguishes this case from the cases on which the Court relies. By its very terms, if the cost sharing provision is contrary to applicable law (*e.g.*, if it is unconscionable), then the arbitrator may not allocate the costs of arbitration to the performer.

A truly unconscionable cost sharing provision is one that requires the parties to share costs without the exception the agreement here contains. *See Martin v. Teletech Holdings, Inc.*, 213 Fed App'x 581, 584 (9th Cir. 2006); *see also Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003) (mandatory arbitration fee sharing); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1177 (9th Cir. 2003) (mandatory "filing fee" paid to employer invalid because (1) payment was to employer and (2) payment not excusable for indigence, as federal court filing fees are);[1] *Ferguson v. Country Wide Credit Indus.*, 298 F.3d 778, 785 (9th Cir. 2002) (mandatory fee sharing); *Circuit City Stores v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002) ("The DRA also requires the employee to split the arbitrator's fees with Circuit City").[2]

At most, these cases establish that, if charging the performer arbitration fees would violate the law, then the cost sharing provision may not be enforced. Accordingly, the arbitration agreement itself addresses the Court's concern. It does not need to be severed because the term itself provides for its own non-enforcement. Based on the foregoing, the question of whether the cost sharing provision rises to the level of strong substantive unconscionability required to render the arbitration agreement unenforceable appears to be one of first impression in the Ninth Circuit.

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[1] *Ingle* is no longer good law, as it applied a presumption of unconscionability of arbitration agreements between employees and employers. *See Concepcion*, 131 S.Ct. at 1745-46 (arbitration agreement may be invalidated only on same standard as other contracts, which are not presumptively invalid).

[2] It is worth noting that most of the cases holding cost or fee sharing provisions to be substantively unconscionable arise in the context of employment arbitration agreements. Here, while the plaintiffs allege they were misclassified as independent contractors and that they should have been classified as employees, BSC contends otherwise and there has obviously been no determination of that issue on the merits in this case.

Finally, as noted, it is likely that the California Supreme Court's decision in *Sanchez* will resolve disparate law on the standard for determining whether a contract or contract term is substantively unconscionable, thus rendering any Ninth Circuit decision on this issue one of first impression under new California law.

c. There Are Substantial Appellate Issues Concerning The Court's Refusal To Sever The Provisions It Concluded Were Invalid

In "California, severance is preferred over 'voiding the entire agreement.'" *Newton v. Am. Debt Servs.*, 549 Fed App'x 692, 695 (9th Cir. 2013) (quoting *Armendariz*, 24 Cal. 4th at 123). "The United States Supreme Court has an even stronger preference for severance in the context of arbitration agreements." *Id.* (citing *Concepcion, 131 S.Ct. at 1749).* Only if the "central purpose of the contract is tainted with illegality," should severability be rejected and the agreement rejected. *Marathon Enter. Inc. v. Blasi,* 42 Cal. 4th 974, 998 (2008).

Accordingly, even if the Ninth Circuit does not disagree with this Court's analysis of the class action waiver or the cost sharing provisions, there is a substantial issue of whether the Court erred in declining to sever these provision. In so doing, the Court found that "the arbitration agreement is riddled with multiple provisions that the court has found substantively unconscionable under governing law." (ECF No. 53 at 17:15-16.) The Court therefore concluded redaction or severance "would constitute 'extensive reformation' . . . ." *Id.* at 17:16-17 (quoting *Jackson*, 629 F. Supp.2d at 1029-31). Particularly if the Ninth Circuit disagrees with the Court on its findings regarding these provisions, it might reasonably decide that the Court abused its discretion in concluding that excising the offending terms would constitute "extensive reformation."

2. The Balance Of Prejudice Favors A Stay

In *Steiner*, the court found that AT&T would suffer substantial harm for several reasons:

the cost of responding to certain discovery procedures that would not be available in arbitration; the impact of having to try the case, then having to arbitrate it if it succeeded in the Ninth Circuit; and the additional costs associated with class certification and likely appeals thereof. *Steiner*, 2008 WL 1925197 at *3, *5. Many decisions that have considered prejudice recognize that substantial litigation costs are a significant prejudice to the movant. *See, e.g., Ward*, 2014 WL 7273911, *3 (substantial difference in cost between arbitration and court litigation constitutes substantial harm); *Brown v. MHN Gov't Servs., Inc.*, No. C 14-1449 SI, 2014 WL 2472094, at *4 (N.D. Cal. June 3, 2014) (stay "necessary to ensure judicial efficiency and to preserve the parties' time and resources"); *Karimy v. Assoc'd Gen'l Contractors of America-San Diego Chapter, Inc.*, No. 08-CV-297-L(CAB), 2009 WL 3698397, at *3 (S.D. Cal. Nov. 5, 2009) (relative cost of discovery constitutes irreparable harm).

Here, as noted, the difference in the scale—and attendant litigation costs—of this case if the arbitration agreement is enforced, versus if it is not enforced, can hardly be overstated. If the litigation were to proceed while BSC's appeal is pending, the parties would first focus on litigating the propriety of class certification and the FLSA collective action. Declaration of Douglas J. Melton ("Melton Decl.") ¶2. Plaintiffs seek to represent a class of thousands of exotic dancers who performed at eleven nightclubs (including eight where the Plaintiffs never performed) on the core question of whether ownership/management of those nightclubs controlled the entertainers who performed there to such a degree that the entertainers should have been classified as employees. This is an inherently fact-intensive analysis.[3] *Id.*

Accordingly, to prove the existence of common questions of law and fact, and that their claims are typical of the claims of other putative class members (including those who performed at nightclubs where the Plaintiffs never performed), Plaintiffs would likely seek discovery as to all eleven nightclubs' practices vis-à-vis entertainers who performed there. This would likely

[3] To determine whether an individual is an "employee" under the FLSA, courts look to the economic reality of the parties' business relationship as a whole. The pertinent factors include: (1) the degree to which the person is independent or is controlled by the putative employer with respect to the way the work is done; (2) the person's opportunities for profit or loss; (3) the person's investment in the facilities and equipment of the business; (4) the permanency and length of the relationship between the business and the person; (5) the degree of skill needed to do the person's work, and (6) if, and how much, the work performed by the person is a major part of the employer's business. See, e.g., *Ruiz v. Affinity Logistics Corporation*, 667 F.3d 1318 (9th Cir. 2012)

involve depositions of managers and personnel at each nightclub as well as written discovery and inspection demands directed at all eleven nightclubs. *Id.* This extensive discovery would be followed by intensive motion practice on the FRCP Rule 23 factors. And all this time and money relates only to the question of class certification!

Thereafter, assuming some class is (or subclasses are) certified, the parties would commence discovery as to the merits of Plaintiffs' claims, which would likely involve the depositions of dozens of performers and more nightclub personnel as well as further paper discovery relating to both liability and damages issues. *Id.* ¶4. Finally, absent summary judgment or a court-supervised settlement, notice and claims process, the parties would engage in one or more jury trials (depending on the contours of any class or subclasses the Court certified), the duration of which are impossible to predict at this juncture. *Id.* ¶5.

In contrast, if the Ninth Circuit holds that the arbitration agreements and class action waivers that are the subject of BSC's appeal should have been enforced, the case would involve two short arbitration hearings, focusing on each Plaintiff's work at the two nightclubs where she performed following a handful of depositions and the exchange of a few hundred pages of documents from Plaintiffs' entertainer files. *Id.* ¶6.

It is impossible to predict at what point in the district court litigation odyssey such a ruling from the Ninth Circuit would arrive. But it is certain that all the parties' prior time and money spent, not to mention the district court's scarce resources, would have been squandered.

On the other hand, a stay pending the appeal would cause the plaintiffs no significant prejudice. This "factor is 'generally concerned with undue loss or destruction of evidence stemming from a delay.'" *Ward*, 2014 WL 7273911, at *4. While there is always some risk of loss of evidence, there is no unique risk in this case. BSC has been in existence for decades at the same North Beach location. It has also initiated a litigation hold to preserve any and all documents likely to be relevant to the issues in dispute in this case, which it has disseminated to the management at all its client nightclubs. Melton Decl. ¶7. As for witnesses, while people working in the adult entertainment business are mobile (like people working in other sectors of the economy), there is no evidence to suggest witnesses in this case would be any less available in the future than in any other litigation. Finally, any risk of prejudice to Plaintiffs applies equally strongly to BSC. There is no reason to think that the risk of lost evidence or fading memories would disproportionally affect Plaintiffs.

3. The Public Interest Favors A Stay

The public interest favors a stay. First, the same benefits of ADR that tip the second factor in favor of a stay also serve the public interest. The speed and efficiency of ADR are the foundation for a strong federal policy favoring arbitration over litigation, which would be contravened by requiring the parties to litigate while the appeal is pending. *Pokorny v. Quixtar Inc.*, No. 07-00201 SC, 2008 WL 1787111, *2 (N.D. Cal. April 17, 2008); *see also Steiner*, 2008 WL 1925197, at *6 ("strong public policy favoring arbitration, as evidenced by 9 U.S.C. §16, which provides for interlocutory appeals when a motion to compel arbitration is denied, but not when one is granted . . . also . . . reflect[s] the benefits arbitration provided, including saving time and money.).

In addition, as noted, if the Ninth Circuit orders the case to arbitration, significant judicial resources will have been wasted. *See Steiner*, 2008 WL 1925197, at *6.

Finally, as noted above, this case bears on a common contract term, that affects other parties entering into similar contracts and even identical contracts among other performers. *See Ward*, 2014 WL 7273911, at *3.

C. The Overwhelming Weight Of Authority Supports A Stay

There are numerous decisions from district courts within the Ninth Circuit that stayed proceedings pending appeal of a denial of a motion to compel arbitration under the *C.B.S. Employees* test. BSC's survey of citable district court cases in the Ninth Circuit has found that a stay was granted in 18 of the 31 cases. The courts issued stays in the following cases: *Ward*, 2014 WL 7273911 (N.D. Cal. Dec. 22, 2014); *Brown*, 2014 WL 2472094; *Zabrowski v. MHN Gov't Servs., Inc.*, No. C 12-05109 SI, 2013 WL 1832638 (N.D. Cal. May 1, 2013); *Ontiveros v. Zamora*, No. CIV. S-08-567 LKK/DAD, 2013 WL 1785891 (E.D. Cal. April 25, 2013); *Antonelli v. Finish Line, Inc.*, No. 5:11-cv-03874 EJD, 2012 WL 2499930 (N.D. Cal. June 27, 2012); *Rajagopalan v. Noteworld, LLC*, No. C11-5574 BHS, 2012 WL 2115482 (W.D. Wash. June 11, 2012); *Sample v. Brookdale Senior Living Cmty's, Inc.*, 2012 WL 195175 (W.D. Wash. Jan. 23, 2012); *Richards v. Ernst & Young LLP*, No. C-08-04988 RMW, 2012 WL 92738 (N.D. Cal. Jan. 11, 2012); *Cardenas v. AmeriCredit Fin. Servs., Inc.*, No. C 09-04978 SBA, 2011 WL 846070 (N.D. Cal. Mar. 8, 2011), stay renewed in *Cardenas v. AmeriCredit Fin. Servs., Inc.*, No. C 09-04978 SBA, 2011 WL 2884980 (N.D. Cal. July 19, 2011); *Del Rio v. CreditAnswers, LLC*, No. 10CV346-WQH-BLM, 2010 WL 3418430 (S.D. Cal. Aug. 26, 2010); *McArdle v. AT&T Mobility LLC*, No. C 09-117 CW, 2010 WL 2867305 (N.D. Cal. July 20, 2010); *Karimy*, 2009 WL 3698397; *Bridge Fund Capital, Corp. v. Fastbuck Franchise Corp.*, No. 2:08-cv-00767-MCE-EFB, 2009 WL 1325823 (E.D. Cal. May 12, 2009); *Steiner*, 2008 WL 1925197; *Pokorny*, 2008 WL 1787111; *Eberle v. Smith*, No. 078-CV-0120 W(WMC), 2008 WL 238450 (S.D. Cal. Jan. 29, 2008); *Mundi v. Union Security Life Ins. Co*, No. CV-F-06-1493 OWW/TAG, 2007 WL 2385069 (E.D. Cal. Aug. 17, 2007); *Jones v. Deutsche Bank AG*, No. C 04-05357 JW, 2007 WL 1456041 (N.D. Cal. May 17, 2007); *see also Howard Elec. & Mech. Co., Inc. v. Frank Briscoe Co., Inc.*, 754 F.2d 847 (9th Cir. 1985) (noting that district court stayed order denying arbitration pending appeal). There are also at least six additional unpublished cases granting a stay decided prior to the January 1, 2007 date in FRAP 32.1, which permits the citation of unpublished decisions.[4]

The cases reaching the opposite conclusion are either distinguishable from the instant case or were plainly wrongly decided. For example, in *Ferguson v. Corintian Colleges*, No. SACV 11-1027 DOC (AJWx), 2012 WL 27622 (C.D. Cal. Jan. 5, 2012), the district court erred by refusing to apply the serious or substantial legal question test adopted by the Ninth Circuit in *Britton*, instead concluding that it would not issue a stay unless the moving party showed a likelihood of success on appeal: "The Court declines Defendants' request to rely only on a showing of a substantial legal question." *Id.* at *3; *see also Just Film, Inc. v. Merchant Servs., Inc.*, No. C 10-1993 CW, 2011 WL 3844071 (N.D. Cal. Aug. 30, 2011) (finding that appeal unlikely to succeed on the merits "[f]or the reasons stated in its . . . Order denying [the] motion to compel arbitration" and rejecting litigation expenses as irreparable harm); *R&L Ltd. Investments, Inc. v. Cabot Inv. Props., LLC*, No. CV 09-15245-PHX-MHM, 2010 WL 3789401 (D. Az. Sept. 21, 2010) (requiring showing of "strong likelihood of success on the merits" and observing that movant argued only that appeal was non-frivolous).

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[4] *Winig v. Cingular Wireless LLC*, No. C-06-4297 MMC, 2006 WL 3201047 (N.D. Cal. Nov. 6, 2006); *Sasik v. AT&T Wireless Servs., Inc.*, No. CV 05-2346 ABC (C.D. Cal. Nov. 1, 2006); *Stern v. Cingular Wireless LLC*, No. CV 05-8842 CAS, 2006 WL 2790243, (C.D.Cal. Sept. 11, 2006); *Lowden v. T-Mobile, USA, Inc.*, No. C05-1482P, 200 WL 1896678 (W.D. Wash. July 10, 2006); *Laster v. T-Mobile USA, Inc.*, No. CV 05-1167 DMS AJB, 2006 U.S. Dist. LEXIS 88855, *1 (S.D.Cal. Mar. 14, 2006); *Plisak v. Rent-a-Center West, Inc.*, No. CV 05-1155-AS, 2006 WL 1030177 (D. Or. Mar. 31, 2006); *Cervantes v. Pac. Bell Wireless*, No. CV 06-01469 JM (RBB), (S.D.Cal. Mar. 8, 2006); *Ford v. Verisign, Inc.*, No. CV 05-0819 JM (RBB) (S.D.Cal. Mar. 8, 2006).

This Court of course must not disregard *Britton*. As articulated in *C.B.S. Employees*, under the standard applied in *Ferguson*, the Court could never issue a stay pending appeal. It would make no sense for the Court to conclude that it was likely that its decision would be reversed.

In *Bradberry v. T-Mobile USA, Inc.*, No. C 06-6567 CW, 2007 WL 2221076 (N.D. Cal. Aug. 2, 2007), the court rejected outright the notion that the cost of litigation could be substantial irreparable harm. The court reasoned that, since the stay pending appeal is not mandatory, it does not make sense that litigation expenses alone would constitute irreparable harm. *Id.*, at *3.

Bradberry's rationale is flawed. First, irreparable injury is but one of four factors, so even if there were irreparable injury in every case, a stay would not be automatic (though it would render the irreparable harm factor moot). Second, there is not always a significant difference between the cost of litigation and the cost of arbitration. In some cases, there is no substantial difference in pre-arbitration procedures and pretrial judicial proceedings, so having to go through the latter would not irreparably harm all defendants.

Bradberry also concluded there was a substantial risk that evidence important to the plaintiff would be lost. *Id.* at *4. There is significant tension between this conclusion and the Court's analysis of the previous factor. The court criticized other cases for treating litigation expenses as an irreparable injury to the party seeking the stay because every case involves litigation expenses. Yet, *any time* there is a stay, there is a risk that evidence that had not been produced could be lost. In the absence of a specific showing of that risk, any such prejudice is speculative and no reason to deny a stay. Accordingly, *Bradberry* misapplied the rule set forth in *Britton*. *See also Kum Tat Ltd. v. Linden Ox Pasture, LLC*, No. 14-CV-02857-WHO, 2015 WL 674962, at *4 (N.D. Cal. Feb. 17, 2015) (movant did not claim any irreparable injury); *In re*

Carrier IQ Inc. Consumer Privacy Litig., No. C-12-md-2330 EMC, 2014 WL 2922726 (N.D. Cal. June 13, 2014) (stay denied without prejudice, and case only allowed to proceed through an amended complaint, 12(b)(6) motion and limited discovery for ADR purposes)*; Balasanyan v. Nordstrom, Inc.*, No. 11-cv-2609-JM-WMC, 2012 WL 1944609 (S.D. Cal. May 30, 2012) (relying on *Bradberry*'s problematic rationale concerning irreparable injury); *Li v. A Perfect Franchise, Inc.*, No. 5:10-CV-01189-LHK, 2011 WL 2293221, at *3-4 (N.D. Cal. June 8, 2011) (rejecting unnecessary litigation expenses as a valid harm and applying a significantly stricter test for a "serious legal question" than any other case addressing this issue);

In a number of other cases there was plainly no substantial issue on appeal nor any hope for success. For example, in *Global Live Events v. Ja-Tail Enter., LLC*, No. CV 13-8293 SVW, 2014 WL 1830998 (C.D. Cal. May 8, 2014), the court held that "the arguments presented by Valensi Rose in its original motion to compel arbitration did not demonstrate that this is even a close or arguable issue, and its brief mention of the issue in the instant motion and at the hearing on the motion added nothing to its case." *Id.* at *8. In, *Covillo v. Specialty's Cafe*, No. C 11-00594 DMR, 2012 WL 4953085 (N.D. Cal. Oct. 17, 2012), the stay was denied based on well-settled California law that "a general employee handbook containing an arbitration provision and an acknowledgment of receipt of the handbook, *did not constitute an arbitration agreement*, in the absence of provision to the employee of an actual arbitration agreement." *Id.* at *2 (emphasis added); *see also Morse v. Servicemaster Global Holdings, Inc.*, No. C 10-00628, 2013 WL 123610, at *3 (N.D. Cal. Jan. 8, 2013) (rejecting concept of irreparable injury based on litigation expenses and finding zero chance of success on the merits on appeal: "Notwithstanding the FAA's strong preference for arbitration where contracts raise doubts, the Court held that *here there is no doubt*" about the outcome (emphasis added; internal quotation marks omitted)); *Newton v. American Debt Servs., Inc.*, No. C-11-3228 EMC, 2012 WL 3155719 (N.D. Cal. 2012), at *3 (no substantial probability of success where appeal asks Ninth Circuit to reverse existing Ninth Circuit case law as inconsistent with Supreme Court case law, and where Ninth Circuit has already considered in detail the alleged inconsistency); *Kaltwasser v. Cingular Wireless, Inc.*, No. C -07-00411, 2008 WL 3925445 (N.D. Cal. Aug. 22, 2008) (no substantial legal question because party opposing arbitration never subscribed to arbitration agreement, and court rejected litigation costs as a valid harm). The court in *Covillo* also concluded that the balancing of interests substantially favored the non-moving party because the movant made the "strategic business decision" to "exploit[] the litigation process for over a year prior to moving to compel." *Covillo*, 2012 WL 4953085 at *3-5.

Finally, in *Peck Ormsby Constr. Co. v. City of Rigby*, No. CIV. 1:1-545 WBS, 2012 WL 914915, (D. Idaho Mar. 15, 2012), the party opposing arbitration "never affirmatively agreed to the arbitration provision" and the slim chance of success on appeal based on the reversal of well-established precedent was too speculative to justify a stay. *Id.* at *3-4. Further, the claim of irreparable harm was mitigated by the fact that only part of the litigation would be subject to arbitration (*i.e.*, some court proceedings were inevitable), and because substantial discovery had already proceeded. *Id.* at *5-6; *see also Mathias v. Rent-a-Center*, No. S-10-1476 LKK/KJM, 2010 WL 4386695 (E.D. Cal. Oct. 28, 2010) (stay denied because part of the claim would be litigated in court regardless of outcome of appeal; further, court granted stay to allow movant to seek stay from Ninth Circuit).

III. CONCLUSION

Defendant's appeal raises serious and substantial questions concerning the enforceability of the arbitration agreement. To preserve judicial resources and prevent the imposition of undue prejudice on BSC, the Court should stay this action pending BSC's appeal, and until the Ninth Circuit's mandate issues.

Dated: March 11, 2015

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